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## Section 375 Fourthly of Indian Penal Code, 1860: A Tale of Judicial Misinterpretation


by  
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### I. INTRODUCTION

The definition of the offence of rape in Section 375 of the Penal Code, 1860 (hereinafter the IPC), as amended by the Criminal Law (Amendment) Act, 2013, retains many of the circumstances from its earlier avatar where a “consensual sexual act” would amount to rape if the consent of the woman was vitiated or that it was not a “free consent”. One such circumstance has been provided in Clause fourthly of Section 375 of the IPC (hereinafter the *clause*).<sup>1</sup>

It was often alleged that the Indian version of rape law is archaic, outdated unable to keep pace with the changing socio-legal mores of the

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society.<sup>2</sup> Even before the Criminal Law (Amendment) Act, 2013 came into force with effect from February 3, 2013, spadework was done for reforming the rape laws in India<sup>3</sup> which included *inter alia*, replacing the word “rape”, with “sexual assault” to make the offence gender neutral.<sup>4</sup> Finally, the Committee on Reforms of Criminal Law (Justice J.S. Verma Committee) which was constituted in the aftermath of the dastardly gang rape of a young paramedical student in the national capital New Delhi in December 2012, suggested many measures to make the criminal laws more responsive to present day challenges of rising crimes against women and to make it in sync with the realities of the Indian society.<sup>5</sup> Apparently, the entire focus of the *Justice J.S. Verma Committee Report* was on the stereotypical notion of rape as a violent violation of a female's bodily integrity. The Criminal Law (Amendment) Act, 2013 is a result of the many suggestions and recommendations made by the Justice J.S. Verma Committee Report. In this entire reform exercise, however, the *clause* seems to have missed the attention it deserved. There is little or no scholarly writing on the subject and there is only one decision of the Supreme Court of India<sup>6</sup>, touching upon the *clause*. As the *clause* has been reproduced in the new definition as well, the pre-amendment judicial delineation of the provision shall still hold good.

### II. THE COMPARATIVE LAW POSITION

It would be pertinent to discuss the “impersonation rape” laws in some other common law jurisdictions to find out its similarity or otherwise with the *clause*.

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#### A. England

The present English law on rape and allied sexual offences is contained in the Sexual Offences Act, 2003 (hereinafter SOA 2003). Section 1 of the SOA 2003, defines

rape as:<sup>7</sup>

"Rape

- (1) A person (A) commits an offence if—
  - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
  - (b) B does not consent to the penetration, and
  - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

..."

In effect, Section 1 of SOA 2003 punishes non-consensual sexual intercourse by a man with a woman.<sup>8</sup>

SOA 2003 has replaced the Sexual Offences Act, 1956 (SOA 1956) which defined rape as:

"Rape of woman or man:

- (1) .....
- (2) A man commits rape if—
  - (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
  - (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
- (3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.



- (4) Sub-section (2) applies for the purpose of any enactment."<sup>9</sup>

### **III. LITERAL INTERPRETATION OF THE CLAUSE-THE RATIONALE**

A criminal statute must be strictly construed and it should punish only those who are clearly and unambiguously hit by its words.<sup>10</sup> If the words of a statute are capable of only one meaning, the rule of literal interpretation would be applied and no deviation from this rule would be possible unless reading the statute as a whole, the context directs us to do so.<sup>11</sup> The *clause* envisages a situation where sexual act between a man and a woman amounts to rape if following conditions are present:

- (a) that the sexual act with the woman has taken place with her consent
- (b) that the accused obtained the consent of such a woman, knowing that he is not the husband of the woman
- (c) that the woman gave her consent believing that she is the lawfully wedded wife of the man with whom she has consented to the sexual act
- (d) that such a belief is mistaken and founded on the deceit played by the accused impersonating her husband

In nutshell, the *clause* criminalizes sexual act with a woman, where the accused has impersonated her husband. It is not difficult to think of illustrative cases and circumstances where the *clause* would be applied, holding the accused guilty of rape. A few such illustrations could be:

- (i) W, a rural girl, was married in 1990, with H, another rural boy of a different

village, when she was 7 and H was 11 years old. Even after her marriage, she lived with her parents and never met her husband. In 1999, A, who is H's friend and knew of the fact of H's marriage with W, visited W's village and sent her a message that he is H, with whom W was married, and he wanted to meet her at a secluded place. W was both apprehensive and excited but fails to recall how his husband H looks like and decided to go to meet him, who is in fact A. When she reached

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the appointed place, A, represented himself as H, and was successful in convincing W that he is her husband. W believed A to be H, her husband and after a small prodding, agreed to have sex with A.


(ii) X, who is an identical twin of Y, had sexual intercourse with Y's wife Z, who consented to have sex with him believing him to be her husband Y. It was dark in the bedroom and in the heat of passion, Z, failed to recognize the minor difference in X's voice.

In both the above illustrations, A and X have committed the offence of rape as provided in the *clause*, punishable under Section 376, IPC.

What is important to note here is that for applying the *clause*, it is essential that the accused knows that he is not the husband of the woman who has consented to have sex with him whereas the woman must have consented believing the accused to be "another man", with whom she is or has been lawfully wedded. A bare perusal of the *clause* leaves no doubt that the consensual sexual intercourse with a woman would amount to rape when such a woman consented to sex believing the accused to be "another man", i.e. her husband. The essence of the offence under the *clause* lies in "impersonation" with an object to have sexual intercourse with a married woman. Interestingly, the *clause* does not explicitly mention the words "impersonation" (by the accused) and "married" (in reference to the victim). It can, therefore, be safely assumed that if a woman, who has had sexual intercourse with the accused, did not believe him to be "another man" i.e. her husband at the moment they both had sex, the offence of rape as covered under the *clause*, would not be made out. In other words, the legislative intent behind the *clause* appears to be punishing "impersonation with an object to have sexual intercourse" with a woman. By implication, it can also be inferred that if there is no impersonation, the case would not be covered by the *clause*. It would mean that, consensual sexual intercourse with a woman who does not believe the accused to be "another man", is not rape within the *clause*. It should also mean that sexual intercourse with a woman would not amount to rape under the *clause*, if the woman consented to sexual intercourse, believing herself to be legally wedded to the accused, and the accused, though knows that he is not "legally wedded" to the woman, has not impersonated "her husband".

Apparently, Section 1(3) of SOA 1956, was in *pari materia* with the *clause*. The SOA 2003, in defining rape under Section 1 makes no reference to "impersonation rape", however, Section 76 of this Act, provides that there would be a conclusive presumption about lack of consent if ".....the defendant intentionally induced the complainant to consent to the

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relevant act by impersonating a person known personally to the complainant".<sup>12</sup> Thus,



the SOA 2003 has further enlarged the scope of "impersonation rape" by specifically raising the presumption of "no consent" where the accused has impersonated another person whom the victim knew personally. This mistaken identity, vitiating consent is not limited to mistaking a man as husband. The early English cases touching upon the issue at hand do not conclusively indicate that there existed in common law an offence of "impersonation rape". In *R. v. Jackson*<sup>13</sup>, a court of 12 judges by a majority of 8 to 4 held that the accused was not guilty of rape when he had sexual intercourse with a woman making her believe that he was her husband. Later on it gradually became an established principle of common law that consent to engage in sexual intercourse is vitiated due to fraud or misrepresentation only when the fraud or misrepresentation extends to the "nature or quality of the act in question"<sup>14</sup> or to the "identity of the person".<sup>15</sup>

In *R. v. Clarence*<sup>16</sup>, the accused, who was suffering from a venereal communicable disease, did not disclose the same to his sex mate and was, consequently tried for rape on the ground that the consent given by his sex mate was bad in law being vitiated by fraud. Acquitting the accused, the court observed that "the only sort of fraud which so far destroys the effect of a woman's consent as to convert a connection consented to in fact into rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. Consent in such cases does not exist at all because the act consented to, is not the act done".<sup>17</sup> Stephen J. recognised that the principle "that fraud vitiates consent in criminal matters" required qualification. Stephen J. was concerned that an unqualified principle that fraud vitiates consent would make many acts of seduction and adultery rape.<sup>18</sup>

Later English decisions reiterated the principle and held the accused liable for rape whether he impersonated the husband or a boyfriend.<sup>19</sup> Now, therefore, it has been unequivocally held by the courts in England over the years that a consent obtained by fraud may or may not vitiate consent, depending upon the peculiar set of facts applicable to the case in hand. In *R. v. EB*<sup>20</sup>, it was held that where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby



vitiated. The act remains a consensual act, may be punishable as some other offence but not rape.

### **A. Australia**


In Australia, *Clarence* has been applied in the context of rape by the High Court in *Papadimitropoulos v. R.*<sup>21</sup> In *Papadimitropoulos*, the defendant fraudulently represented to a young Greek woman recently arrived in Australia that she had gone through a marriage ceremony with him. This was not true. The defendant had simply given notice of his intention to marry at the Melbourne Registry Office. There was some evidence that the young woman never intended to consent to intercourse outside marriage. The High Court in *Papadimitropoulos* traced the historical development of the principles governing vitiation of consent. The High Court emphasized that it was the victim's mistake as to the nature and character of the act or identity of the accused (rather than the accused's fraud) which would vitiate consent. The High Court recognized that the defendant's fraudulent conduct, although not rape, could be punished under another less serious criminal offence, namely, procuring sexual intercourse by fraud or false pretences.

## **B. Canada**

The first reported case involving a charge of sexual assault was *R. v. Francis*<sup>22</sup>, decided by the Court of Queen's Bench for Upper Canada. The accused had attempted to have sexual intercourse while the complainant was sleeping — pretending, it seems, to be the complainant's husband. She awoke, and he fled. Draper, J. reviewed the leading case in England<sup>23</sup> and acquitted him despite clear evidence of criminality.<sup>24</sup> In addition to viewing the complainant's evidence with great suspicion, early Canadian decisions seem to be reluctant to convict the accused for rape minus the evidence of force and violence.<sup>25</sup>

In 1867, Parliament of Canada passed legislation prohibiting rape<sup>26</sup>, but it did not define what constituted rape and thus, the offence continued to be

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governed by the common law definitions. It was in 1892 that the Criminal Code defined rape<sup>27</sup> in the following manner:

“Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representation as to the nature and quality of the act”.


The elements of this offence remained largely intact until 1983 when Parliament enacted legislation reclassifying the offence from rape to a sexual assault. This legislation was based on the proposition that sexual assault is fundamentally an act of violence, and not of passion. However, it can be said that a consent of a woman obtained by impersonating her husband would be rape.

## **C. The United States**

In the United States, the traditional approach finds rape by fraud in only two narrow contexts. The first involves a man deceiving the woman into thinking that she is submitting to a nonsexual act. The other tactic involves a man who obtains intercourse by masquerading as the woman's husband.<sup>28</sup> Researchers have identified the two archetypal rape by fraud cases, fraudulent medical treatment and husband impersonation.<sup>29</sup> It has been noted<sup>30</sup> that the spousal impersonation cases “form the bulk of the fraud cases”. A number of States have enacted statutes which extend the traditional definition of rape to include sexual intercourse achieved by fraud or impersonation. For instance, in Arizona and North Carolina former statutes<sup>31</sup> defined the crime of rape to include the situation: “Where the female submits under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief”. Additionally, the Model Penal Code makes it a crime for a male to have sexual intercourse with a female when he knows that she submits because she mistakenly supposes that he is her husband.<sup>32</sup>

In *People v. Ogunmola*<sup>33</sup>, the court affirmed rape by fraud conviction of gynecologist who obtained intercourse with patient by fraudulently

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purporting to effect penetration by medical instrument. Again in *People v. Quinlan*<sup>34</sup>, the court affirmed sexual assault conviction of respiratory therapist who obtained digital penetration of patient by fraudulently purporting to perform diagnostic test.

Earlier, in *State v. Navarro*<sup>35</sup>, the court convicted the accused of rape by fraud for obtaining intercourse by entering sleeping victim's bed at night and impersonating her husband.

It is however, doubtful whether, impersonation as a boyfriend/girlfriend would be hit by the prohibition. In *People v. Hough*<sup>36</sup>, the defendant was charged with sexual misconduct in violation of New York state's Penal Law § 130.20 (1) which provides that a person is guilty of sexual misconduct when he, being a male, engages in sexual intercourse with a female without her consent. The information stated that the defendant, the twin brother of complainant's boyfriend, deceived the complainant into having sexual intercourse with him without her consent impersonating his brother (complainant's boyfriend). After reviewing the earlier authorities, the court found that in the present case, in absence of clear wordings of the statute, the defendant can not be held guilty of sexual misconduct, though he may be guilty of some other wrong, which the prosecution is free to press against him. The above discussion of laws similar to the *clause* lead to an unambiguous conclusion that "impersonation rape" would require a mistaken belief in the victim about the "identity" of the accused. Any other mistake by the victim having its origin in the fraud played by the accused, would not convert the sexual intercourse between the two into rape unless the fraud pertains to the nature and consequences of the sexual act.

#### **IV. CONSENT CONUNDRUM IN RAPE LAW AND JUDICIAL RESPONSE IN INDIA**

A commonsense understanding of rape law indicates that sexual intercourse "without the consent of the prosecutrix" is rape. For the purposes of rape law, consent, it has been suggested<sup>37</sup>, should have the following definition:

"A woman consents, if she agrees by choice, and has the freedom (not under fear of injury, misconception of fact) and capacity (not being of unsound mind, intoxicated so as to be unable to understand the nature and consequences of that to which she consents) and makes that choice for



sexual intercourse with a man; and the man has an honest and reasonable belief that such consent was by her free choice made with the required mental capacity".

The question of fraud vitiating consent has been raised and answered by the courts in India in a multitude of decisions.<sup>38</sup> Also, Section 375, read with Section 90 of IPC<sup>39</sup>, makes it crystal clear that a consent given under a "misconception of fact" is no consent in the eye of law, thereby, converting the sexual intercourse into rape. Section 375, IPC as amended by the Criminal Law (Amendment) Act, 2013 now contains a statutory explanation<sup>40</sup> as to what would constitute a valid consent. Unlike Section 90 of IPC, which is a general provision concerning consent, this explanation is exclusively applicable to the offence of rape. However the basic principles underlying the idea of consent in rape cases remains unchanged.

Most of the Indian decisions on the question of "consent given under misconception of fact" relate to the circumstances where the consent of the woman to sexual intercourse was obtained by making a promise of marriage, which was subsequently not kept. In *Uday*<sup>38</sup>, it was held that a false promise is not a fact within the meaning of the IPC and hence a false promise to marry cannot fall under "misconception of fact", which it construed to mean misconception as to "the nature and consequences of the sexual act". However, in *Deelip*<sup>38</sup>, the Supreme Court distinguished between "false promise" and a "breach of promise", holding the former covered under the "misconception of fact" and consequently vitiating the consent to sexual intercourse.



Applying that principle to a case arising under Section 375, IPC, consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under "misconception of fact". If, on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying the victim and the promise to marry held out by him was a mere hoax, the consent supposedly given by the victim will be of no avail to the accused to exonerate him from the ambit of Section 375 Clause secondly of



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IPC. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of *Jayanti Rani Panda v. State of W.B.*<sup>41</sup> which was approvingly referred to in *Uday*. The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end "unless the Court can be assured that from the very inception, the accused never really intended to marry her". In *Deelip*, this test was applied to decide whether the accused could be convicted under Section 375, IPC on the basis of misconception of fact arising from false promise to marry.

It has been argued that sexual intercourse, consent to which is obtained by making a false promise of marriage is not rape, it is however not to suggest that the same might not be punishable under law. Thus, where a false promise of marriage is made and the same leads to "damage or harm to that person in body, mind, reputation or property", the same might be punishable under Section 417, IPC for cheating.<sup>42</sup> In *Bipul Medhi v. State of Assam*<sup>43</sup>, it was held that when an accused makes a false promise to marry, which he never intends to carry out, and induces thereby the victim so deceived, to have with him sexual act, which the victim would not have indulged in or permitted, had she not been induced by such deception and, when such act of having sexual intercourse by her with the accused causes, or is likely to cause, damage or harm to her body, mind or reputation, the act of the accused would amount to cheating. Thus, when a woman is induced to part with her chastity or virginity, which is the most valued possession of hers, the person, who so induces the woman by making false representation, would be liable for punishment under S. 417, IPC if the victim's having sexual intercourse, with such a person, causes or is likely to cause harm to her body, mind or reputation, for, in such a case, unless so deceived, the victim would not have permitted sexual act by the accused.<sup>44</sup>

*Pradeep* appears to have treaded a cautious path holding that while determining whether there was a consent, court must in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, as each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a "misconception of fact". Thus the above discussion leads to an inference that "false promise", "false pretence" or "misrepresentation" etc. would not *per se* convert the sexual intercourse into rape, unless the falsehood or fraud relates to "nature and consequence" of the sexual act. The Indian law and similar laws in other common law jurisdictions stand on the same pedestal in this regard.



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## V. THE CLAUSE AND THE CASE LAW-A JUDICIAL TRAVESTY

As mentioned earlier, "impersonation rape" would be constituted only where the accused has impersonated the husband of the prosecutrix and has had sexual intercourse with her. On the other hand, where the accused, being married, lies to the prosecutrix about his marital status, making her believe that he is single, thereby inducing her to have sexual intercourse with him on a promise of marriage, it is not rape. It may be cheating. Also, where the accused, by deceit, induced a false belief in the mind of the prosecutrix that she is lawfully wedded to him, and thereby has cohabitation or sexual intercourse with her, the case would be covered under Section 493, IPC.<sup>45</sup>

The offence in Section 493, IPC is non-cognizable<sup>46</sup>, non-bailable<sup>47</sup> and non-compoundable<sup>48</sup> whereas rape is a cognizable, non-bailable and non-compoundable offence. Section 192 of the Code of Criminal Procedure, 1973, stipulates that only the aggrieved party can take recourse to criminal sanction for the offence under Section 493, IPC.

Compared to the minor procedural distinctions, the *clause* and Section 493, IPC are fundamentally different in their elements. However, the Indian courts appear to be confused about the scope of these two provisions. This confusion is inexplicable considering the fact that the framers of IPC had put both the provisions in different chapters dealing with two different subjects. Section 493, is in Chapter XX of the IPC titled "offences against marriage". The object of Chapter XX of the IPC, as a whole, appears to be protection of the sanctity and integrity of the institution of marriage, whereas object of Chapter XVI of which rape is a part, is protection of bodily integrity of a person. Section 493, IPC, only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. To prove deception, it must be conclusively established that the accused had dishonestly or fraudulently concealed certain facts or made a false statement knowing it to be false.<sup>49</sup> The fundamental difference between Section 493, IPC and the *clause* is that impersonation is not an essential element of the former whereas without impersonation as the husband of the prosecutrix, the offence under the latter would not be made out.



Is it possible that an accused is guilty under both the provisions on the basis of same set of facts? Yes, says a Division Bench of Calcutta High Court in *Kartick Kundu v. State*<sup>50</sup>, holding that:

*When the girl is below 16 years of age and any man has sexual intercourse with her the offence of rape under S. 375(5) is committed. Where the consent is obtained fraudulently making-her believe that she has been lawfully wedded then the offence falls under S. 375(4) and S. 493. The "deceit" contemplated under S. 493 can be practised upon a woman who is above 16 years of age and also who is below 16 years of age. The Penal Code does not distinguish between a minor and a major woman. It will be an unwarrantable encroachment upon the section to introduce a limitation on the ground of minority and to hold that a minor is excepted in S. 493, Penal Code.<sup>51</sup>*

It must be noted that all cases covered under Section 493, IPC would not be covered under the *clause*, as the latter requires an additional element of impersonation. If there is deceit contemplated under Section 493, IPC coupled with impersonation, the case would fall in both, the *clause* and Section 493, IPC, otherwise



not. In *Sunil Vishnu Salve v. State of Maharashtra*<sup>52</sup>, it has been held that the *clause* applies when a man induces a married woman to have sexual intercourse with him by impersonating her husband. The Court further took the stand that *when consent by a woman to a man was given under misconception of fact that he was her husband, it amounted to rape by a person to whom the woman believed to be her husband.*

Recently, in *Bhupinder Singh v. Union Territory of Chandigarh*<sup>53</sup>, (hereinafter *Bhupinder*), the Supreme Court had an occasion to interpret the *clause*. Being the only apex court decision on the issue at hand, it is worthwhile to discuss the case in detail. The facts of the case are that the prosecutrix Manjit Kaur filed a complaint stating that she was employed as Clerk in All Bank Employees Urban Salary Earners Thrift Credit Society Ltd. and worked as such till September, 1991. The accused Bhupinder Singh was employed as Data Entry Operator in the State Bank of Patiala, Sector 17-C, Chandigarh. He used to come to her office and developed intimacy with her. The accused proposed to the prosecutrix, representing himself as single, to which she agreed and their marriage was solemnized soon after. She got pregnant sometime in 1991, but on the insistence of the accused got



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it terminated. She again became pregnant in July 1993 and their relations remained cordial till March, 1994.

In the mean time some friends of the accused told her that he was already married with one Gurinder Kaur and was having children from the said wedlock. She went to the accused, who had, on the pretext of going for some work, gone to his first wife Gurinder Kaur. She had a fight with both Bhupinder Singh and Gurinder Kaur there and tried to inform police about the same but was prevented by her relatives from doing so. On 16-4-1994, she was admitted in General Hospital and gave birth to a female child. She informed the accused Bhupinder Singh about this as he was the father of the child. But Bhupinder Singh did not turn up. Incensed, the prosecutrix lodged a complaint with the police consequent upon which a case was registered for the offences punishable under Sections 420/376/498-A, IPC<sup>54</sup>.

In his statement under Section 313 of the Code of Criminal Procedure, 1973, the accused-appellant took the stand that he started knowing the prosecutrix after his marriage with Gurinder Kaur. The prosecutrix was known to his wife before her marriage with him and she had come along with her mother to their place in 1988. The prosecutrix stayed in their house for six months. Thereafter, he arranged a job for her. However, she had shifted to another place after getting a job and being of loose morals, entertained many people. When he learnt that she was of loose morals and was going out with different persons at odd hours, he objected and told the complainant to mend her ways. But she started fighting with him and demanded money which he did not pay and, after delivery of the child, she filed a false complaint. Gurinder Kaur stated that she knew the prosecutrix prior to her marriage. Documents were also produced to show that in official documents, accused-appellant had shown the prosecutrix as his wife and nominee.

Upon trial, in a judgment dated 20-9-1999 passed by learned Additional Sessions Judge, Chandigarh, the accused was convicted for offences punishable under Sections 376 and 417 of IPC<sup>55</sup>. He was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 10,000/- with default stipulations for the first offence and rigorous imprisonment for nine months in respect of the second offence. An appeal against the aforementioned order of conviction was filed by the accused-appellant in the Puniab & Harvana High Court.



The High Court found that the case at hand was covered by the *clause*, therefore, the accused was guilty of the offence and was liable for punishment under Section 376, IPC. Accordingly, the conviction, was upheld. But, taking into account the fact that the complainant had *knowledge* about his marriage and had yet surrendered to him for sexual intercourse; the court held this to be a fit case for reduction of sentence and award of adequate compensation.<sup>56</sup> Accordingly, custodial sentence of three years' rigorous imprisonment was imposed in place of seven years' rigorous imprisonment as was done by the trial court. The compensation was fixed at Rs. 1,00,000/- which was directed to be paid within three months. It was indicated that in case the compensation amount was not paid, the reduction in sentence would not be given effect to.<sup>57</sup> The High Court took this view of the offence in spite of the arguments advanced by the counsel for the appellant that when the complainant *knew* that he was a married man and yet consented for sexual intercourse with him, the *clause* would have no application. It was also submitted that the fact that the complainant *knew* about his being a married man, is clearly established from the averments made in a suit filed by her where she had sought for a declaration that she is the wife of the accused.<sup>58</sup> The accused preferred an appeal to the Supreme Court by way of Special Leave.

The Supreme Court, speaking through Justice Arijit Pasayat, observed that:<sup>59</sup>

*Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause "Fourthly" of Section 375, IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause "Fourthly" of Section 375, IPC makes this position clear.*

It was held by the Supreme Court that the High Court had reduced the sentence taking into account the peculiar facts of the case, more particularly, the knowledge of the complainant about the accused being a married



man. The Supreme Court found this *knowledge*, to be sufficient and adequate reason for reduction of the sentence and awarding of compensation to the victim and dismissed the appeal.

It is submitted that the Supreme Court judgment in *Bhupinder* suffers from fundamental legal infirmities and does not correctly interpret the law under the *clause*. The first fundamental error, which the Supreme Court committed in *Bhupinder* is, that it confused "mitigating circumstances" with "exonerating circumstances". The former merely mitigate the culpability while making the accused criminally liable for the offence, with a lesser punishment. Section 376, IPC allows the courts to award punishment lesser than the statutory minimum punishment prescribed for rape, if

sufficient and adequate reasons for doing so exist. However, this does not mean that where the facts do not disclose commission of a particular offence; in the name of judicial discretion, the same could be *brought* under it. Doing so would be against the established canons of interpretation of penal statutes.<sup>60</sup> On the other hand the “exonerating circumstances” would be those which take the case away from the definition of the offence, or in other words, where, the facts do not disclose commission of a particular offence, which the accused has been charged with. It is not uncommon in such circumstances for the courts to convict the accused with some other offence, subject to the condition that the same is not prejudicial to the accused.<sup>61</sup>

Secondly, the Supreme Court did not refer to any authority or case law on the subject in arriving at the conclusion of guilt. And the last but not the least, the Supreme Court failed to read the *clause* as a whole and selectively omitted the words “because she believes that he is another man”. A mistaken belief in the validity of marriage and the same about the identity of the accused would mean different things and lead to different criminal liability under different provisions of the IPC. The Supreme Court read the *clause* to apply to a situation where the sexual intercourse had taken place *with her consent, when the man knew that he was not her husband, and that her consent was given because she believed herself to be law-fully married*, and thereby enlarged its grasp.

In *Bhupinder*, if at all, the facts disclose commission of an offence under Section 493, IPC. Ends of justice would have been met, had the accused-appellant been held guilty under Section 493, IPC, with the same punishment. Identifying the appropriate offence and awarding punishment commensurate with guilt is fundamental to criminal justice dispensation.

As Jeremy Horder puts it:



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[W]hat matters is not just that one has been convicted, but of *what* one has been convicted. If the offence in question gives too anemic a conception of what that might be, it is fair neither to the defendant, nor to the victim. For, the wrongdoing of the former and the wrong suffered by the latter will not have been properly *represented* to the public at large.<sup>62</sup>

The framers of IPC were conscious of “fair labeling”, which has become common currency in criminal law scholarship over recent decades.<sup>63</sup> “The concern of fair labeling”, Andrew Ashworth writes, “is to see that widely felt distinctions between kinds of offence and degrees of wrongdoing are respected and signaled by the law, and that offences are subdivided and labeled so as to represent fairly the nature and magnitude of the law-breaking”.<sup>64</sup>

What makes the matter worse is the implication of *Bhupinder*. Till *Bhupinder* is overruled by the Supreme Court, there is every possibility that the same would be (mis) guiding the subordinate courts resulting in a grave travesty of justice.<sup>65</sup>


## **VI. CONCLUSION**

That rapists deserve no mercy has become a cliché. Rape committed by use of force and violence can in no case be pardoned or condoned. The leading commonwealth countries though started with a constricted approach by confining their attention to the offence of non-consensual rape involving force and violence, later enlarged the scope of rape to include even the impersonation rape, a good change over. The



Countries like England and the U.S.A. clearly defined and applied impersonation rape in their jurisdictions, in view of specific mention of impersonation in their legislations. The Indian law also fell in the changing wave length which existed in the leading Commonwealth countries. But, the courts in India failed to properly appreciate the ingredients of this offence. However, in their zeal to curb criminality, the courts can not enlarge a penal provision whimsically. *Bhupinder* is in bad taste and does no justice either to the victim or the accused. Fairness demands that offenders be labeled and punished in proportion to their wrongdoing and the rapist ought to be branded and

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punished as a rapist. However, every one who has had sexual intercourse with a woman in circumstances, criminalizing such sex outside a case of impersonation, ought not to be branded as a rapist otherwise it would do irreparable harm to the accused who was supposed to be treated differently.

Now, therefore, it is high time that Parliament amend the *clause* to expressly mention the requirement of impersonation. It is suggested that the clause 'Fourthly' be amended to the following effect:

with her consent, when her consent has been obtained by impersonating her husband.

— — —

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<sup>1</sup> Section 375: "A man is said to commit rape if he—

- a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

..."

<sup>2</sup> The Criminal Law (Amendment) Act, 2013 made certain changes in rape law and other sexual offences in India, especially by enlarging the definition of rape to include penetration of any part of the body of a woman which was previously restricted to only the "penile-vaginal" penetration. Other significant changes include enhanced punishment in certain aggravating circumstances. The statutory age of consent has been raised from sixteen years to eighteen years. However, the amendments did not alter the basic understanding of rape as a bodily offence against a woman and the marital rape exception remains in its worst form.

<sup>3</sup> See *172nd Report of the Indian Law Commission* (2008) available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (accessed on 31/08/2013). See also, the Criminal Law (Amendment) Bill, 2010, available at <http://www.prsindia.org/uploads/media/draft/Draft%20Criminal%20Law%20%28Amendment%29%20Bill%202010.pdf> (accessed on 31/08/2013).

<sup>4</sup> See *Sakshi v. Union of India*, (2004) 5 SCC 518 : 2004 Cri LJ 2881. See also, Pandey K.A., "They Also Serve Who Only Stand and Wait": *A critique of Priya Patel v. State of M.P.*, (2006) 6 SCC 263 : AIR 2006 SC 2639, 2 RMLNLJ 135, (2010). Interestingly, the Criminal Law (Amendment) Ordinance, 2013 had substituted the term "rape" with "sexual assault" but when the Criminal Law (Amendment) Act, 2013 replaced this Ordinance, the word "rape" was again brought back on the statute book.

<sup>5</sup> See, the full text of the Justice J.S. Verma Committee Report, available at <http://www.thehindu.com/news/resources/full-text-of-justice-vermas-report-pdf/article4339457.ece> (accessed on 23/09/2013).

<sup>6</sup> *Infra*, note 53.

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape> (accessed on 26/08/2013).

<sup>8</sup> Other forms of sexual assaults are defined and punished in the successive sections of SOA 2003, *Ibid*.

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/Eliz2/4-5/69/section/1> (accessed on 26/08/2013).

<sup>10</sup> *Attorney General v. Sillem*, (1864) 33 LJ Ex 92.

<sup>11</sup> *Attorney General v. Milne*, 1914 AC 765 (HL).

<sup>12</sup> See <http://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape> (accessed on 27/09/2013).

<sup>13</sup> (1822) Russ & R 487. See also *R. v. Burrow*, (1868) LR 1 CCR 156.

<sup>14</sup> *R. v. Flattery*, 1877 QBD 410.

<sup>15</sup> *R. v. Case*, (1850) 1 Den. 580; *R. v. Dee*, (1884) 15 Cox CC 579.

<sup>16</sup> (1888) 22 QBD 23.

<sup>17</sup> *Id.* at 44. (*Emphasis supplied*).

<sup>18</sup> *Ibid*.

<sup>19</sup> *R. v. Olugboja*, (1981) 3 All ER 443.

<sup>20</sup> 2006 EWCA Crim 2945.

<sup>21</sup> (1957) 98 CLR 249.

<sup>22</sup> (1856) 13 U.C.Q.B. 116.

<sup>23</sup> *R. v. Jackson*, *supra*.

<sup>24</sup> *R. v. Francis*, *supra* at p. 17.

<sup>25</sup> In *R. v. Fick*, (1866) 16 UCCP 379, appellate court, consisting of three judges (per A. Wilson, J., Richards, C.J. and J. Wilson, J. concurring), concluded that, to convict, a jury must be satisfied not merely that the act was against the will of the complainant, but that she was by physical violence or terror overcome by the accused and resisted as much as she could.

<sup>26</sup> In the Offences Against the Person Act, R.S.C., c. 174, S. 37, it was provided that "everyone who commits the crime of rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years".

<sup>27</sup> The Criminal Code, 1892, 55-56 Vict., c. 29. S. 226.

<sup>28</sup> See, Anne Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1, 19 (1998).

<sup>29</sup> Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 *Brook. L. Rev.* 39, 119 (1998).

<sup>30</sup> Ernst Wilfred Puttkammer, *Consent in Rape*, 19 *U. Ill. L. Rev.* 410, 422 n. 45 (1925).

<sup>31</sup> *Ariz Rev Stat* § 13-611; *NC Code Gen Stat* § 1103, L 1881, ch 89.

<sup>32</sup> Model Penal Code § 213.1 [2].

<sup>33</sup> 238 Cal Rptr 300, 304—05 (Cal Ct App 1987).

<sup>34</sup> 596 NE2d 28, 31 (Ill. 1992).

<sup>35</sup> 367 P 2d 227, 230 (Ariz. 1961). See also, *Pinson v. State*, 518 So 2d 1220, 1224 (Miss 1988).

<sup>36</sup> 159 Misc 2d 997 (1994) : 607 NYS2d 884.

<sup>37</sup> Shreya Garg & Shreya Mukherjee, *The Role of Consent in the Offence of Rape*, available at <http://www.allindiareporter.in/articles/index.php?article=1170> (accessed on 28/05/2012).

<sup>38</sup> See, *Pradeep Kumar v. State of Bihar*, (2007) 7 SCC 413 : AIR 2007 SC 3059 (referred to as *Pradeep* in the text); *Deelip Singh v. State of Bihar*, (2005) 1 SCC 88 : AIR 2005 SC 203 (referred to as *Deelip* in the text); *Uday v. State of Karnataka*, (2003) 4 SCC 46 : AIR 2003 SC 1639 (referred to as *Uday* in the text); *State of Karnataka v. Anthonidas*, ILR 2000 KAR 266.

<sup>39</sup> "A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception ..."

<sup>40</sup> "Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity".

<sup>41</sup> 1984 Cri LJ 1535 (Cal).

<sup>42</sup> See Bala S. & Saha R., *Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar*, (2005) 1 SCC 88 : AIR 2005 SC 203, 1 NUJS L. Rev. (2008) 149 at pp. 150-151.

<sup>43</sup> 2008 Cri LJ 1099 (Gau).

<sup>44</sup> *Id.* at paras 35-37.

<sup>45</sup> S. 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage:

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>46</sup> See, the First Schedule of the Code of Criminal Procedure, 1973.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id.* Sections 320-321.

<sup>49</sup> See, Gaur K.D., *A Textbook on Penal Code*, 1860, 720 (3rd ed.) 2004.

<sup>50</sup> 1967 Cri LJ 1411 (Cal). (*Emphasis supplied*).

<sup>51</sup> *Id.* at paras 16, 17.

<sup>52</sup> 2006 Cri LJ 587 (Bom).

<sup>53</sup> (2008) 8 SCC 531 : 2008 Cri LJ 3546.

<sup>54</sup> Section 420, IPC prescribes punishment for "cheating and dishonestly inducing delivery of property. Section 498-A, IPC punishes cruelty against a married woman by her husband and his relatives".

<sup>55</sup> Section 417, IPC punishes cheating *simpliciter*.

<sup>56</sup> *Bhupinder, supra*, note 53 at para 7.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Id.* at para 8.



<sup>59</sup> *Id.* at para 11.

<sup>60</sup> *Shanti Prasad Jain v. Director of Enforcement, FERA*, AIR 1962 SC 1764.

<sup>61</sup> See, *Maran Chandra Paul v. State of Tripura*, 1997 Cri LJ 715 (Gau.) at para 7.

<sup>62</sup> Horder J., *Rethinking Non-Fatal Offences Against the Person*, (1994) 14 *OJLS* 335, at p. 339.

<sup>63</sup> See, Chalmers J & Leverick F, *Fair Labelling in Criminal Law*, (2008) 71 *Modern Law Review* 217, at p. 217.

<sup>64</sup> Ashworth A., *Principles of Criminal Law* 88, (5th ed.), 2006.

<sup>65</sup> Article 141 of the Constitution of India, provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

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